

### ***13 Official Opinions of the Compliance Board 21 (2019)***

- ◆ **1(A)(3) Public Body – Determined not to be a public body. School Board committee created only by president/chair. (No Violation)**
- ◆ **2(A) Notice – Generally. Website notice found to have been adequate. (No Violation)**
- ◆ **Violations: None**

\*Topic numbers and headings correspond to those in the Opinions Index posted on the Open Meetings webpage at [www.marylandattorneygeneral.gov/Pages/OpenGov/OpenMeetings/index.aspx](http://www.marylandattorneygeneral.gov/Pages/OpenGov/OpenMeetings/index.aspx).

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**April 19, 2019**

#### **Re: Audit Committee of the Board of Education of Baltimore County**

The complaint alleges that the audit committee of the Board of Education of Baltimore County (“School Board”) violated the Open Meetings Act with regard to two meetings in January 2019. According to the complaint, the audit committee did not provide advance notice and did not prepare minutes of those meetings.<sup>1</sup> The School Board, through counsel, responded on behalf of the committee.

According to the School Board’s response, there are actually two committees at issue here: the standing audit committee, which met on January 16, and a smaller *ad hoc* audit committee, which met on January 18. The School Board contends that the *ad hoc* committee is not a public body subject to the Act, and that the standing committee complied with the Act’s provisions. As explained below, we agree that the *ad hoc* committee is not a public body for purposes of the Act. However, we cannot conclude that the standing committee meets the Act’s definition of a public body, though we commend the School Board’s efforts to treat it as such.

The standing audit committee consists of four members of the twelve-member School Board. Two of the standing committee members, in turn, comprise the *ad hoc* audit committee. According to the School Board, both committees were created pursuant to School Board Policy 8270, which states:

The [School Board] reviews and acts on a wide variety of issues. At times, it is necessary to establish standing or special committees of the [School] Board to review a specific topic and to report and make recommendations to the [School] Board.

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<sup>1</sup> The complaint also alleges that the committee violated several School Board policies and did not provide a live video stream of the meetings. With regard to the former allegation, this Board is authorized only to review alleged violations of the Open Meetings Act; accordingly, we do not review a public body’s compliance with its own bylaws or policies. With regard to video streaming, although the Act permits a public body to post “live and archived video or audio streaming” of its meetings in lieu of preparing written minutes, the Act does not require that practice. *See* Md. Code Ann., General Provisions (“GP”), § 3-306(b)(2)(i).

The [School] Board Chair will annually appoint [School] Board members to serve on its standing committees, which shall be advisory in nature. The recommendations of such standing committees shall be submitted to the entire [School] Board for formal action.

Special committees of members may be created by the [School] Board for specific assignments. These special committees shall be appointed by the [School] Board Chair and shall terminate upon completion of the committee's assignment or by a vote of the [School] Board.

According to the School Board, it does not know when the standing audit committee was established or by what method, only that it may have been in existence as early as 1998, and that its name changed from the "Budget and Audit Committee" to the "Audit Committee" in 2012. The *ad hoc* audit committee was created by the School Board Chair in February 2018 "without formal action or resolution."

The Act applies only to "public bodies" as that term is defined in the Act. *See* § 3-101(h)<sup>2</sup> (defining "public body") and §§ 3-301 *et seq.* (detailing the Act's requirements for public bodies). The Act sets forth three ways in which a multimember governmental entity, such as a School Board committee, might be deemed a "public body." First, such a committee is a public body if it was created by, among other legal instruments, "a rule, resolution, or bylaw." § 3-101(h)(1)(ii)(6). Second, alternately, a multimember governmental committee is a public body if it was appointed by "the Governor or the chief executive authority of the political subdivision"—or someone subject to that person's policy direction—and includes in its membership at least two members of the public. § 3-101(h)(2)(i). Third, a committee would be a public body if it is appointed by a gubernatorially-appointed public body in the Executive Branch of State government—or an official subject to that entity's policy direction—and includes two members of the public. § 3-101(h)(2)(ii).

The *ad hoc* audit committee clearly does not qualify as a public body under any of these definitions. It was not established by a rule, resolution, bylaw, or other formal method, but by the School Board Chair. *See* 7 OMCB Opinions 105, 107 (2009) (finding that a library board's finance committee was not a public body where the board's bylaws did not create the specific committee, but instead provided a general authorization for the creation of standing and special committees). The *ad hoc* committee also does not contain any members of the public, thereby precluding it from meeting either of the definitions of "public body" in § 3-101(h)(2). *See* 9 OMCB Opinions 83, 86 (2013) (interpreting § 3-101(h)(2)'s definition of public body as requiring at least two members of the public, as opposed to members of the governmental entity, and finding a city council's finance committee did not meet that definition where all of its members were council members).<sup>3</sup>

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<sup>2</sup> References are to the General Provisions Article of the Maryland Annotated Code (2014, 2018 supp.).

<sup>3</sup> The elected School Board Chair, who created the *ad hoc* committee, also does not meet the other criteria in § 3-101(h)(2). The Chair is not appointed by the Governor, the chief executive of Baltimore County, or a gubernatorially-appointed State Executive Branch public body, nor is the Chair appointed by someone subject to the policy direction of any of those entities. *See* 10 OMCB Opinions 51, 52-53 (2016) (explaining

The status of the standing audit committee is less clear because the School Board does not know how the committee was originally established. Although the School Board is generally authorized to create standing and special committees under Policy 8270, the School Board cannot recall the specific method by which the standing committee was formed. If, on one hand, it was created by a formal resolution of the School Board—or if a formal resolution mandated the performance of certain functions undertaken by the standing committee—the committee would qualify as a public body. *See 7 OMCB Opinions* 176, 184 (2011) (finding a committee of the MTA to be a public body where an MTA resolution mandated the performance of functions carried out by the committee, even though the resolution did not specifically create the committee). *See also* Open Meetings Act Manual, Chapter 1, page 3 (“the more precisely [a formal provision] identifies the function of a committee, the more likely it is that the committee will be deemed a public body.”). But if, on the other hand, the standing audit committee was informally created by a past School Board Chair—without formal resolution or ratification—the committee would not be a public body. *See 7 OMCB Opinions* at 107.

When we have faced a similar conundrum in the past, we have stopped short of stating our own conclusion on whether the entity in question is a public body. *See 9 OMCB Opinions* at 85 (where a city council’s finance committee may have been “created by some long-forgotten executive order or Council resolution that gave it a defined role and membership,” but where it was “just as possible . . . that it was informally constituted,” we could not determine whether it was a public body because it was “not our place to infer that a law was enacted or order issued”). However, we have noted that a committee arguably “comes very close” to being a public body if its parent formally refers a matter to it, by resolution or otherwise. *Id.*

In light of the ongoing nature of the standing audit committee and the functions it performs, the safest course for the School Board clearly is the course it has been following—that is, to treat the committee as a public body subject to the Act. In any event, we will resolve this complaint, as it pertains to the standing audit committee, in the alternative: If the Act applies, we find that the committee complied with it on January 16, 2019 by meeting in public and by providing advance notice and an agenda for that meeting on its website.<sup>4 5</sup> If the Act does not apply, the committee did not violate it.

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that county boards of education are not departments of the county government or of the State Executive Branch, and are not subject to the policy direction of the county executive or a gubernatorially-appointed Executive Branch public body).

<sup>4</sup> The School Board explains that the committee has not yet posted minutes for that meeting because the committee has not met since. We encourage the committee to establish a practice for adopting minutes more promptly, such as by email adoption. *See 8 OMCB Opinions* 125, 126-27 (2013) (explaining that although the email circulation of draft minutes is not itself a transparent process, on balance, it better serves the interest of transparency for a public body that meets infrequently to make minutes available promptly after a meeting than to wait until its next meeting).

<sup>5</sup> Although not raised in the complaint, we note that the School Board did not provide us with a closing statement for the closed portion of the committee’s January 16 meeting. We refer the School Board to

### **Conclusion**

The School Board's *ad hoc* audit committee is not a public body subject to the Act and therefore did not violate the Act. The status of the standing audit committee is unclear, but, in any event, its practices in January 2019 complied with the Act.

Open Meetings Compliance Board

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Chapter 5 of the Open Meetings Act Manual, available on the Open Government page of the Attorney General's website, for guidance on the necessary steps it must take before, during, and after closing a meeting, including preparing a written closing statement before closing the session, and providing a summary of the closed session in the minutes of its next open meeting. Even if a public body closes an open meeting solely to carry out an administrative function, it must still include a summary of that closed session in the minutes of its next open meeting. *See* § 3-104 (requiring a public body that recesses an open session in order to carry out an administrative function to disclose in its open-session minutes the "date, time, place, and persons present" at the administrative function meeting and "a phrase or sentence identifying the subject matter discussed" there).